

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 206 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI

and

MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

COMMISSIONER OF INCOME TAX

Versus

B.V. JOSHIPARA

Appearance:

Mr.M.J.Thakore for Petitioner

Mr.M.J.Shah for Mr.J.P.Shah,for Respondent No. 1

CORAM : MR.JUSTICE S.M.SONI and

MR.JUSTICE Y.B.BHATT

Date of decision: 04/10/96

ORAL JUDGEMENT(Per Soni,J.)

At the instance of the Commissioner of Income Tax

this Reference is made and the following question is referred to us:

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in coming to the conclusion that the assessee was entitled to deduction of Rs.2,165/- on account of leave encashment.?"

The Tribunal has allowed the claim of the assessee for the deduction of the amount received by him towards encashment of leave. The assessment year is 1978-79. The assessee derived income from salary, dividend, interest etc. The Income Tax Officer had disallowed the claim of deduction of Rs.2165/- being the amount of leave encashment. However, the A.A.C. on appeal directed the I.T.O to allow the same. Relying on a Madras Bench decision, the Tribunal upheld the decision of A.A.C. and rejected the appeal of the revenue. Hence, at the instance of the revenue, the present reference is made. The question referred to us is clearly covered by the decision in the case of COMMISSIONER OF INCOME TAX VS. N.B. TENDOLKAR, 221 ITR p.268. There, the Madras High Court after considering the earlier decision has held as under:

" A similar view was taken by the Allahabad High Court in the decision in All India Defence Accounts Association , In re:Shailendra Kumar v. Union of India [1989] 175 ITR 494, while considering whether encashment of leave salary taxable under section 17(3) of the Act, prior to the amendment. Learned Counsel appearing for the assessee submitted that in view of the provisions contained in section 17(1)(va), the encashment of leave salary is taxable from April 1,1978, onwards and prior to that date, the encashment of leave salary is not taxable. It was further submitted that profit in lieu of salary is taxable under section 17(3)(ii) of the Act. According to learned Counsel when the encashment of leave salary is taxable under the provisions contained in section 17(1)(va), the provisions contained in section 17(3)(ii) would be only residuary in nature. The contention put forward by learned counsel cannot be accepted because the assessment year under consideration would fall prior to the amendment. The law as it stood prior to amendment has to be followed in the present case. According to the unamended provisions of section 17(3) of the Act, profit in lieu of salary is liable to be taxed. As we have seen in the above said three decisions all courts uniformly came to the conclusion that encashment of leave salary is profit in lieu of salary and, therefore taxable under section 17(3) of the Act prior to the amendment. Learned standing counsel also took us through the objections for

introducing the amendment and the Bill introduced by the Government in Parliament relating to the provisions contained in section 10(10AA)(ii) and section 17(3)(ii) of the Act. The intention of the Legislature prior to the amendment is to tax the encashment of leave salary since it happened to be profit in lieu of salary. Therefore, we hold the Tribunal was not correct in coming to the conclusion that encashment of leave salary is not income chargeable under the Act."

Clause (va) to sub section 1 of Section 17 of the Income Tax Act is now very clear. Now, salary includes any payment received by an employee in respect of any period of leave not availed of by him. The said amendment came into operation with effect from 1st April, 1978 which also covers the assessment period of the respondent-assessee. Thus, Tribunal was not right in upholding the appeal, confirming the order of A.A.C. and setting aside the order of I.T.O. Hence, the question referred to us is required to be answered in the negative i.e. in favour of the revenue.

In the result, we answer the question referred to us in the negative i.e. in favour of the revenue.

Reference stands disposed of accordingly.

sf-sms